

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK SMYLIE and JUDITH SMYLIE,

Plaintiffs-Appellees,

v

DRYDEN CONSTRUCTION, INC., DOUGLAS
G. NUCCI, and TOWNSHIP OF ALMONT,

Defendants,

and

PAUL M. WILCOX,

Defendant-Appellant.

UNPUBLISHED

July 14, 2009

No. 286243

Lapeer Circuit Court

LC No. 07-038552-CZ

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant-appellant appeals as of right from the circuit court’s order denying his motion for summary disposition predicated on governmental immunity. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs purchased a home, then brought suit against the builder, its owner, the defendant township, and defendant-appellant, the township’s building inspector, asserting negligent construction, breach of contract and warranties, and misrepresentation of the condition of the dwelling and quality of construction. In addition to their general complaints concerning construction standards, plaintiffs asserted in their complaint that their home “was constructed over the natural underground watercourse and drain resulting in constant saturation of the new home requiring constant pumping,” resulting in “water leakage, cracks, and water infiltration.”

The township and defendant-appellant sought summary disposition based on governmental immunity. The trial court granted the motion with respect to the municipality, but denied it with respect to defendant-appellant on the ground that there existed questions for the jury concerning whether defendant-appellant had acted with gross negligence and whether such negligence was the proximate cause of plaintiffs’ injuries.

On appeal, defendant-appellant does not dispute that a question exists for jury determination concerning his gross negligence, but he argues that the trial court erred in failing to grant summary disposition on the ground that plaintiffs have not shown proximate causation.¹ “We review a trial court’s decision with regard to a motion for summary disposition de novo as a question of law.” *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). MCR 2.116(C)(7) authorizes motions for summary disposition premised upon “immunity granted by law” When analyzing a motion pursuant to MCR 2.116(C)(7), this Court must consider the affidavits, depositions, admissions and other documentary evidence the parties introduce to support their positions. *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001), lv den 465 Mich 965 (2002). Regardless, “[i]n analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Id.*

¹ MCL 691.1407 also requires that a plaintiff establish that the governmental employee defendant owes a common-law duty to the plaintiff. *Rakowski v Sarb*, 269 Mich App 619, 6276; 713 NW2d 787 (2006).

In common-law negligence cases, a duty is “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Antcliff v State Employees Credit Union*, 414 Mich 624, 630-31; 327 NW2d 814 (1982), quoting Prosser, Torts (4th ed), § 53, p 324; see Prosser & Keaton, Torts (5th ed), § 53, p 356. More specifically, a duty “concerns whether a defendant is under *any* legal obligation to act for the benefit of the plaintiff.” *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 n 4; 679 NW2d 689 (2004) (emphasis in original).

When a court determines whether to impose a common-law duty, it considers (1) the relationship of the parties, (2) the “foreseeability of the harm, [(3) the] degree of certainty of injury, [(4) the] closeness of connection between the conduct and injury, [(5) the] moral blame attached to the conduct, [(6) the] policy of preventing future harm, and, [(7)] finally, the burdens and consequences of imposing a duty and the resulting liability for breach.” *Buczowski v McKay*, 441 Mich 96, 101 n 4; 490 NW2d 330 (1992), citing Prosser & Keeton, § 53, p 359 n 24; *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004). The inquiry is “ultimately a question of fairness” involving a “weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.” *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 420; 224 NW2d 843 (1975) (LEVIN, J., dissenting) (citation omitted), cited with approval in *Buczowski, supra* at 101 n 5. [*Id.* at 629-630.]

In this case, plaintiffs fail to plead that defendant-appellant had a common-law duty to plaintiffs, nor do they present evidence or an argument indicating that such a duty exists between the parties. This failure hinders their argument that the trial court’s denial of defendant-appellant’s motion for summary disposition was correct.

MCL 691.1407(2) provides that “each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person . . . caused by the officer [or] employee . . . while in the course of employment or service” The immunity was contingent, however, on the following conditions being met:

- (a) The officer [or] employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The officer’s [or] employee’s . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2)(a)-(c).]

For purposes of the latter provision, “the proximate cause” does not invoke the ordinary common-law principles of causation, but instead means “the one most immediate, efficient, and direct cause preceding an injury.” *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Citing *Robinson*, this Court has held that, where a person is injured as the result of a faulty handrail, even if a building inspector’s approval of that structure six months earlier constituted gross negligence, the inspector’s gross negligence still could not be deemed the proximate cause of the injury because the inspector’s alleged misconduct was not “the one most immediate, efficient, and direct cause” of the injury. *Rakowski v Sarb*, 269 Mich App 619, 636; 713 NW2d 787 (2006).

In this case, plaintiffs assert that defendant-appellant approved both the faulty construction site before construction began and approved the finished building after construction. In distinguishing this case from *Rakowski*, plaintiffs emphasize that the construction project would not have gone forward in the first instance had the defective site not been negligently approved. However, plaintiffs cite no authority for the proposition that a building inspector’s oversight wholly relieves a builder from any responsibility for the decision to build on unsuitable ground. Further, plaintiffs not only accused defendant-appellant of wrongly approving the site in the first instance, but in their complaint, they also accused the builder of failing to consult drain commission maps or otherwise obtain information from the appropriate drain commissioner that would have alerted the builder to the problems with the location. Plaintiffs thus admit that defendant-appellant was not the sole authority on which the builder might reasonably have relied when deciding to build on the property.

Because the builder at least shared in the responsibility for the decision to proceed on an unsuitable site, we hold that defendant-appellant’s role in the matter cannot reasonably be regarded as “the one most immediate, efficient, and direct cause preceding” the problems that plaintiffs allegedly experienced with their home, including those resulting from water coming into the house. *Robinson, supra*. Instead, we hold that the construction defects that plaintiffs allege were more immediately and directly caused by those who actually performed the construction work than by defendant-appellant, the governmental functionary who approved the job before and after construction.

For these reasons, we reverse the result below and remand this case to the trial court with instructions to grant defendant-appellant summary disposition on the ground of governmental immunity. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio